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ATTORNEY GENERAL

April 6, 1977

Honorable Charles F. Hyder
Maricopa County Attorney
101 West Jefferson
Phoenix, Arizona 85003

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Re: 77-80 (R77-41)

Dear Mr. Hyder:

In your letter of February 2, 1977, you asked for our opinion whether the Maricopa County Board of Supervisors may utilize attorneys other than the Maricopa County Attorney, who by statute is required to be the Board's legal adviser. A.R.S. § 11-532.A.9.

A county board of supervisors has only such powers as are either expressly conferred by statute or necessarily implied therefrom. Associated Dairy Products v. Page, 68 Ariz. 393, 206 P.2d 1041 (1949); Peters v. Frye, 71 Ariz. 30, 223 P.2d 176 (1950). There is no express statutory provision authorizing the Board to employ attorneys to represent or advise the Board. Therefore, the question here is whether the power to employ attorneys necessarily can be implied from the grant of other powers.

In the early case of County of Santa Cruz v. Barnes, 9 Ariz. 42, 76 P. 621 (1904), the Supreme Court of the Territory of Arizona considered whether the Board of Supervisors of Santa Cruz County under the authority of subdivisions 15 and 24 of paragraph 397 of the Revised Statutes of 1887* could retain the

*Rev. Stats. Ariz. 1887, § 397 which is substantially the same as A.R.S. § 1-952 read: The board of supervisors . . . have jurisdiction and power, under such limitations and restrictions, as are prescribed by law: . . . (12) To control the prosecution or defense of all suits to which the county is a party . . . (17) To do and perform all such other acts and things as may be necessary to the full discharge of the powers and jurisdiction conferred on the board.

services of outside attorneys to arrange for the bonded indebtedness of the county which at the time seemed likely to result in litigation and as to a part of which bonded indebtedness outside counsel in fact conducted litigation. In holding that the retention of outside counsel was within the Board's authority in that case, the court indicated its approval of the employment of outside counsel either on the motion of, or with the consent of, the county attorney "to protect the interests of the county not only in the conduct of, but in the preparation for, any litigation to which the county may be a party," 9 Ariz. at 49, but noted that it was not considering "the authority of the board to employ counsel other than the district [county] attorney, at a monthly salary, to sit with them to furnish legal advice to them as officers of the county, nor the right of the board to disregard or supersede the district [county] attorney as the law officer of the county, and employ other counsel to transact the county business in his stead." 9 Ariz. at 49.

The rule of the case, as enunciated by the Court, provides:

"It is and should be the law that the supervisors of the county, on motion of, or with the consent of the district attorney, have the power, when they find it necessary or advisable, to employ counsel in addition to the district attorney to protect the interests of the county, not only in the conduct of, but in the preparation for, any litigation to which the county may be a party." 9 Ariz. at 49.

In Pima County v. Grossetta, 54 Ariz. 530, 97 P.2d 538 (1939), the question was answered affirmatively with regard to certain matters where the Pima County Board of Supervisors employed special counsel to sue on behalf of the county. The Court reasoned:

"It will be seen by this subdivision that the board of supervisors is given the final authority to direct and control all actions in which the county is a party, either as plaintiff or defendant. It may frequently occur that the county attorney has one idea as to the advisability of

bringing an action for the county, or as to how it should be handled, while the supervisors have a different one, so that there would be a lack of harmony between them. Under such circumstances it would seem that the public interest would require that the men who had the final authority in all matters in regard to the action should be allowed to choose the counsel who actually handled its legal phases. Since there is no specific prohibition against it in the statutes, we think subd. 14, supra, gives implied authority to the board of supervisors in its discretion to employ counsel in the handling of all matters to which the county is a party." 54 Ariz. at 540.

Although the Grossetta opinion does not cite or refer to the Barnes decision, it appears to us that Grossetta is consistent with Barnes, reiterating the rule that the Board of Supervisors has inherent authority to retain counsel for litigation matters. The question of whether such hiring requires the consent of the County Attorney was not treated in Grossetta, since the original service contracts had been entered into with the consent of the County Attorney. The question of approval by the County Attorney was likewise not directly at issue in the Barnes case, consent having also been obtained from the County Attorney. However, given the dicta in Barnes, quoted above, requiring approval, we conclude that the power of the supervisors to select counsel to handle matters likely to result in litigation is subject to concurrence by the County Attorney.

Neither of the cited Supreme Court decisions directly treats the broader question of whether the Supervisors are authorized to retain counsel to render general advice with respect to the conduct of county business. The Barnes decision expressly reserved judgment whether the Board has authority "to employ counsel other than the district attorney, at a monthly salary, to sit with them to furnish legal advice to them as officers of the county" 9 Ariz. at 49. However, given the mandate of A.R.S. § 11-532 that the County Attorney shall "act as the legal adviser to the board of supervisors . . .", we believe that, as a general proposition, the Board of Supervisors cannot unilaterally employ civil counsel to render general legal advice in place of the County Attorney. While there are no Arizona cases directly

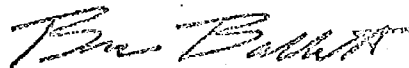
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in point, there are several relevant California cases holding that the Board of Supervisors cannot employ and pay special counsel on a salaried basis for performing duties which the law imposes on the County Attorney.* Merriman v. Burnum, 48 P. 727 (1897). Since our statutes on this subject were adopted from California law, their case law interpreting these statutes are highly persuasive if not controlling. See County of Santa Cruz v. Barnes, 9 Ariz. 42, 76 Pac. 620 (1904).

Apart from litigation, there may well be other special situations where the Board and the County Attorney may resort to outside counsel such as conflict of interest situations and problems requiring special expertise not possessed by the County Attorney. It would not be feasible to categorize and analyze all such situations, and in any event, such determinations should be left to the sound discretion of the Board and the County Attorney.

Please let me know if we can be of further assistance.

Sincerely,



Bruce E. Babbitt
Attorney General

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*California, since 1941, has by legislation created the office of County Counsel which is a separate entity from the District Attorney. See Section 27640 (West's Annotated California Government Code).